FILE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1937

No. [redacted] 15

WAIALUA AGRICULTURAL COMPANY, LIMITED (an Hawaiian corporation),

Petitioner,

vs.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian, etc.,

Respondents.

OPPOSING BRIEF OF ELIZA R. P. CHRISTIAN, BY HERMAN V. VON HOLT, HER GUARDIAN, IN RESPONSE TO THE PETITION OF WAIALUA AGRICULTURAL COMPANY, LIMITED, FOR WRIT OF CERTIORARI.

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The respondent, Eliza R. P. Christian (hereinafter called the "ward"), respectfully submits that the petition

of Waialua Agricultural Company, Limited (hereinafter called "Waialua"), should not be granted. By way of precaution, in order to save her rights in the event that Certiorari should be granted, the ward has filed a cross-petition for a Writ of Certiorari. The present brief seeks to set forth the reasons why Waialua's petition should be denied.

STATEMENT OF THE CASE.

A more complete statement is set out in the ward's cross-petition at pages 2 to 5. In accordance with Subdivision 3 of Rule 27 of the Rules of the Supreme Court, we limit ourselves, in this portion of the brief, to a correction of inaccuracies and omissions in the statement contained in Waialua's petition.

(a) The summary of the findings of the trial Court relative to the mental condition of the ward, found at pages 2-3 of Waialua's petition, gives an incomplete and misleading picture of the facts found. Filling in the omitted portions, represented in Waialua's petition by asterisks (Pet. top of p. 3), the finding reads (R. 132-3):

> "1. Eliza (Holt) Christian, petitioner, neither was, nor is, an idiot, a lunatic or utterly imbecile.
>
> 2. She was and is, however, a person of undeveloped intellect, incapable of forming a reasoned judgment or understanding; incapable of comprehending her own right to an independent status, the extent or nature of property or of her property interests, the value of money, or the ordinary matters of life essential to a reasonable degree of independent living.

3. She had insufficient mental capacity to comprehend the difference between $100.00 and $1000.00; between $30,000.00 or $60,000.00, for her individual rights; or to comprehend the difference between payment to her individually, for her sole disposition, of any such sum or sums and payment to her circle of relatives and under their control; or whether $30,000.00 or any sum was for her rights as distinct from the rights of others involved in the deal; or the difference between present payment of income and future payment of principal; or to understand that she had rights distinct and independent of her father or of Annie Kentwell.

4. She could not possibly have comprehended, even with advice worthy of trust, the elements necessary to form an independent judgment or to exercise a reasonable measure of choice or of will relative to the value of cane land, pineapple land, ranch land or any kind of land in any quantity; or of postponed rights therein as opposed to present interests; or even the elementary character of her rights and direct the disposition of what she owned.

5. The court is convinced that Eliza did not have the most elementary capacity to understand and judge her rights and protect herself from undue influence and fraud; and that at no time was she an independent actor with a knowledge of her rights.

6. In short, she was mentally incompetent to execute a conveyance in 1910 or at any other time within the scope of the evidence and the law in this case."

The Supreme Court of Hawaii on the first appeal, after an exhaustive review of the evidence, found that: "She was feeble-minded. Born in 1885, in May, 1910, she has the mentality of a child of not more than five or six. * * *

In short, we find that at the date of the deed she was a congenital imbecile" (R. 272-3); the trial Court on the remand said "* * * the congenital imbecility of petitioner has been found heretofore both by this court and the supreme court * * *" (R. 476) and the Supreme Court on the second appeal reaffirmed "the finding that on May 2, 1910 Eliza was a congenital imbecile and incompetent to execute the deed of that day". (R. 552.)[1]

(b) We challenge the statement in the petition (p. 5) that the decisions below establish that "Waialua had no knowledge of the incompetence and paid an adequate consideration".

As to knowledge, the finding of the trial Court was merely that "the evidence does not clearly show that the respondent, Waialua Company, knew of such mental incompetency". (R. 158.) The Supreme Court of Hawaii found (R. 555) or, as the Circuit Court of Appeals said in its opinion, "assumed" (R. 1593), or, as the latter Court said in its opinion on denying rehearing, "made an implied finding" (R. 1637)[2] that Waialua did not have notice of the incompetency. We shall show hereafter that the record compels, as a matter of law, a finding that Waialua did have notice.

1. The brief, in a footnote at page 23, states that "the ward had executed other conveyances, and had been accepted as a party to various transactions. Examination of those portions of the record to which the footnote of the Petition refers will show that the "conveyances" and "transactions" were for the most part those now in question or others with the same group of relatives of the ward as were involved in the instant "conveyance" and "transaction". In its decision in the first appeal, the Supreme Court of Hawaii in the course of its discussion of the evidence relating to the ward's mental competency said of these instruments, "None of these instruments, of course, bears any internal evidence of Eliza's mentality. She did not prepare them nor was she, so far as the evidence shows, a participant in the negotiations to which they related." (R. 265-6.)

2. Since the filing of Waialua's petition and the ward's cross-petition, this opinion has been reported in 94 Fed. (2d), page 805.

As to adequacy of consideration, the trial Court found "that the price paid by Waialua was clearly a bargain, and not adequate". (R. 159.)

(c) While the petition states (p. 3) that the property involved is a 1/3rd interest in 14,000 acres of land, known as the Holt tract, the further statements in the petition and the supporting brief (Pet. pp. 3-6; 36-42) would give the impression that the entire Holt tract was incorporated in Waialua's plantation and extensive improvements made on and off the tract, because of Waialua's reliance upon the ward's execution of the lease of 1905 and of the deed of 1910. The petition further implies that the effect of the decree of the Circuit Court of Appeals will be to take the entire Holt tract of 14,000 acres out of the possession of Waialua, to make continued unified operation impossible and to destroy, in large part, the benefit of Waialua's expenditures for improvements.

In fact, without regard to the instruments in question and through other conveyances, Waialua acquired and still owns title to an undivided 16/27ths of the Holt tract and is in possession as lessee of an additional 2/27ths under a lease other than the one from the ward. All of these rights are independent of the claim of the ward in this litigation; all of them stand unassailed or unquestioned. The record shows without conflict that Waialua acquired 2/27ths interest in the Holt tract prior to the date of the lease (March 17, 1905) and 5 additional 27ths in various transactions before the date of the deed (May 2, 1910) and 9/27ths on May 28, 1910. (R. 1259-1260; 849-50 Subs. 3, 4; 894 Subs. 12, 13, 14; 899 Sub. 16; 960.)

The cancellation of the deed, and the 1905 lease, as to the ward, would leave Waialua the owner of 16/27ths of the tract, and the lessee of 2/7ths thereof.

As owner of an undivided 16/27ths interest in the tract, and lessee of 2/27ths, Waialua will not be ousted from possession or from enjoyment of its improvements by the decree of the Circuit Court of Appeals or any proceedings under that decree. If there should be a partition suit, which alone could affect Waialua's possession of any part of the tract, the Court having jurisdiction of such suit would have ample power, under the Hawaiian law, to fully protect the equities of Waialua. (Revised Laws of Hawaii, 1935, Sec. 4746.) The trial Court did not consider that the improvements would present any difficulty in partitioning the interests of the contestants. (R. 500.) In this connection we point out that the improvements were all made on or for use on sugar cane land, the pineapple land being leased to Hawaiian Pineapple Company which operated and still operates it and which lease the ward has ratified. (R. 536, Sub. 5.) Only 1623 acres of the Holt tract are cane land, while 6476 acres are pineapple land. (R. 1423 and see map attached to Waialua's Pet., opposite p. 48.) In a partition suit, the Court could readily allot to the ward her entire 1/3rd interest out of the pineapple lands. This would leave Waialua all the cane lands and give it the continued use of these lands and of the improvements as a part of its unified plantation operation.

The failure of Waialua to accurately and candidly present the facts and the issues in its petition is alone ample ground for refusing to grant the Writ.

Erie v. Kirkendall (1924) 266 U. S. 185, 69 L. Ed. 236;

Sutter v. Midland etc. (1929) 280 U. S. 521, 74 L. Ed. 590;
Davis v. Currie (1924) 266 U. S. 182, 69 L. Ed. 234;
Southern Power Co. v. North Carolina etc. (1924) 263 U. S. 508, 68 L. Ed. 413.

In the light of the inaccuracies pointed out, how can it be said that Waialua has presented "clear definite and complete disclosures concerning the controversy" which is the requirement laid down by this Court in *Southern Power Co. v. North Carolina*, supra?

THE REASONS RELIED UPON FOR THE WRIT DO NOT BRING THE PETITION WITHIN THE SCOPE OF RULE 38, SUBDIVISION 5.

(a) Waialua misconceives the basis of the decision.

Although repeated in five different ways (Pet. p. 13), in fact the one reason counted upon to support the application for the writ is that the Circuit Court of Appeals determined that the contract of an incompetent made with one who had no knowledge of the incompetency and for an adequate consideration is void in the sense of being a nullity,[3] whereas Waialua contends the correct rule is

3. It seems clear that the reason stated under heading 4 (Pet. p. 13) is simply another way of saying that the Circuit Court of Appeals erroneously adopted the rule that an incompetent's contract is a nullity. Should, however, this be construed as a separate reason for granting the writ, we wish to point out briefly that the reason is wholly without merit. The petitioner states under this heading that the Court below has laid down the rule "that in a bill in equity for cancellation of a deed upon the ground of incompetence of the grantor, it is error for the trial Court to balance the equities of the parties". This we submit is a palpable misinterpretation of the opinion of the Circuit Court of Appeals. The claim is based upon a single sentence of the opinion. It is a part of the discussion of the various conditions under which an incompetent may or may not be entitled to relief against "some act he has done". (R. 1600.) The opinion says: "The courts should not be concerned with his (the incompetent's) reason, but, after proof of incompetency, with the status of the parties, as shown hereinafter by the various factual situations." Then follows the sentence upon

that such a contract is not a nullity but is voidable, i. e., subject to being set aside upon application to a Court of Equity upon such conditions as may be considered just in the premises.

It is only necessary to read the opinion in this case, and to consider the result it reaches, to find a complete answer to Waialua's major premise and consequently to destroy the point upon which it relies in seeking the writ. The Circuit Court of Appeals did not decide that such a contract of an incompetent is a nullity, but, on the contrary, declared such a contract would be set aside only if the situation of the parties so dictates. (R. 1598.) We quote from the opinion (R. 1603):

> "The great majority of the courts, however, take the view, in the case of the innocent party without knowledge, that relief will not be granted unless the parties can be placed in statu quo * * *. The court below took this view on the first appeal in regard to the deed. We believe that the law thus declared in its first decision is correct."

In denying Waialua's petition for a rehearing, the Court repeated that it was not deciding that the contract of the incompetent ward was a nullity, saying (R. 1635):

> "The company says great harm will result from the rule as announced by us. There are, however, two fallacies in its reasoning. In the first place, it fails

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which petitioner bases its claim, which reads as follows: "This, as will appear, does not mean that the court should balance all equities of the parties, as was done by the trial court." 'This is not a statement that it is error for the trial court to balance the equities of the parties". When read in connection with what precedes and follows it means at most that the balancing of the equities is not the sole determining factor—as might be the case if the ground for rescission were mistake as opposed to incapacity,—but that the contract of an incompetent may be set aside if, upon a consideration of all the circumstances, it appears that the parties can be restored substantially to status quo.

to recognize what the rule is. It assumes that relief will be granted upon a showing of incompetency. Such is not the case. The record of land titles can be disturbed only upon proof of incompetency and of a position of parties which authorizes relief. Both are required."

The Circuit Court of Appeals considered Waialua to be an innocent purchaser for an adequate consideration and required as a condition to cancellation that the status quo be restored. It required the ward to pay, or credit, to Waialua the purchase price of the property with interest at 6% from May 2, 1910, and also that an allowance be made to Waialua in the amount by which the land had been enhanced in value by the addition of improvements, not to exceed their cost. The opinion stated (R. 1603):

"The rule as stated means that if the parties can be placed in statu quo the relief will be granted * * *. It is no legal hardship on the party dealing with the incompetent if he receives back what he gave in the bargain."

And again (R. 1605):

"Both courts found * * * that the company could be placed in statu quo * * *. These conclusions were reached after careful consideration of the evidence. * * * We accept them * * *."

The imposition of a condition that status quo be restored is completely inconsistent with the view that the contract is void in the sense of being a nullity and consistent only with the view that the contract is voidable upon the aggrieved party doing equity. This proposition is, in truth, recognized by Waialua in its brief attached to its petition. (Pet. pp. 44-47.)

A judicial opinion, like any other writing, should be interpreted as a whole. (15 C. J. 970.) Waialua's contention that when the Court used the word "void" (R. 1597) it meant the instrument had no validity whatsoever, a contention based on the selection of isolated passages, fails completely when the result directed by the decision is considered. How can it be said that the Circuit Court of Appeals has held the deed of an incompetent to be a nullity when it states in its opinion on denying rehearing:

> "It (referring to Waialua) assumes that relief will be granted upon a showing of incompetency. Such is not the case. The record of land titles can be disturbed only upon proof of incompetency and a position of parties which authorizes relief. Both are required." (R. 1635.)

The basis of the decision is that the contract of an incompetent will be set aside regardless of the good faith of the other contracting party when status quo can be restored.

Waialua's failure to "adequately and fairly disclose the * * * the grounds upon which the * * * Court rested its decision" warrants this Court's denial of the application.

Sutter v. Midland Valley Railroad Co. (1929) 280 U. S. 521, 74 L. Ed. 590.

(b) Of the two rules, (1) that the contract of an incompetent is void and a nullity, and (2) that it is voidable upon condition that restoration be effected, the instant decision adopts the rule more favorable to Waialua.

Inasmuch as the harsher rule—that a contract of an incompetent is void in the sense of being a nullity—was not

followed by the Circuit Court of Appeals, Waialua is, under the decision, receiving the consideration which it paid for the deed, plus interest thereon from the date of payment (R. 1629), and the value of the improvements placed upon the land not to exceed their cost. (R. 1616-1618.) Far from being injured by the rule followed by the Circuit Court of Appeals, Waialua is better off than it would have been had the Court followed the alternative rule which Waialua argues in its petition was followed. Waialua cannot complain of those parts of the decision which are in its favor, and accordingly the conflict of authority to which it points is not available to Waialua as a reason for the issuance of the writ.

Alexander v. Cosden Pipe Line Co. (1934) 290 U. S. 484 at 487, 78 L. Ed. 452 at 456.

(c) There is no such conflict in the decisions as to warrant this Court in granting certiorari.

Waialua argues that the Circuit Court of Appeals in this case determined that the contract of an incompetent was void in the sense of being a nullity, and cites Federal cases which it contends establishes a contrary and conflicting rule. If we assume, for purposes of argument, that Waialua's analysis of the opinion is correct, it does not follow that a conflict warranting certiorari exists.

The cases to which Waialua points (Pet. p. 12) are, with one exception, those of the District Courts, and three of the four turn on the rule prevailing in the state whose laws the Court was administering.

Kevan v. John Hancock etc. Ins. Co. (Dist. C. Mo. 1933) 3 Fed. Supp. 288;

Safe Deposit & Trust Co. v. Tait (Dist. C. Md. 1931) 54 Fed. (2d) 383;

Levine v. Whitney (Dist. C. Rhd. Isl.-1934) 9 Fed. Supp. 161;

Beale v. Gibaud (Dist. C. N. Y.-1936) 15 Fed. Supp. 1020,

are all District Court cases. The first one turns upon the law of Missouri, the second one upon the law of Maryland and the third one upon the law of Massachusetts. In the fourth one, it was found that the one seeking cancellation was in fact competent. If we assume that these cases are in conflict with the instant decision as interpreted by Waialua still a conflict arising from decisions of District Courts is not one warranting this Court in granting certiorari. (*Jurisdiction of the Supreme Court of the United States*, Robertson and Kirkham, Sec. 295.)

The result reached in *Luhrs v. Hancock* (1900) 181 U. S. 566, 45 L. Ed. 1005, was no doubt correct under the facts of the case; but the sentence in the opinion quoted by petitioner was not necessary to the decision.

ARGUMENT IN OPPOSITION TO POINTS RAISED IN PETITIONER'S BRIEF.

INTRODUCTION.

We believe that we have disposed of Waialua's point made in support of its petition, but lest we be deemed to agree with its "Brief in Support of the Petition for Writ of Certiorari", we discuss that document.

The brief is divided into what are called six points. Only one of them, Point 1, is in support of the actual reason assigned by Waialua in its petition as entitling it to a writ of certiorari. One other, Point VI, argues the conse-

quence of what Waialua conceives to be the purport of the decision. The other four points really admit that the Circuit Court of Appeals has decided the case upon the voidable rule (and consequently confess the error in the reason relied upon in support of the petition) and argue that Waialua has not been given enough in the order for restoration. Stated more simply, the four points are devoted to a question of fact and to the discretion of the lower Courts—three of them—as to just what should be done to restore status quo in this case. We doubt that this Court is sufficiently concerned with the degree of restoration already passed upon by three inferior Courts with substantially the same result to predicate a writ upon any such complaint. Beyond that Waialua is limited to the ground relied upon in its petition. (*Gunning v. Cooley* (1930), 281 U. S. 90, 74 L. Ed. 720.)

REPLY TO POINT 1, THAT "THE RULE THAT THE CONTRACT OF INCOMPETENTS ARE AT MOST VOIDABLE IS NOW ALMOST UNIVERSALLY ACCEPTED."

Waialua is correct that, considering all the cases both State and Federal in the United States and those in England, the majority of them hold that the contract of an incompetent is not void in the sense of being a nullity, but is only voidable in the sense of being subject to avoidance at the suit of the incompetent upon equitable terms. It is in error, however, as to the law when it argues that the rule applicable in this suit, arising in Hawaii, is any more favorable to it than that administered by the Circuit Court of Appeals.

Whatever may be the law of England,[4] it is the law of every state that has spoken upon the subject in the United States,[5] and the law announced and followed in the Federal Courts,[6] that the contract of an incompetent will be set aside at the instance of the incompetent regardless of the good faith of the other party if status quo can be restored. In truth, many of the Federal cases and the decisions from the Courts of various states do not require restoration to be effected. (46 A. L. R. 416; 95 A. L. R. 1143.) In this suit, the trial Court, the Supreme Court of Hawaii, and the United States Circuit Court of Appeals, have each found that the ward was incompetent, namely, a congenital imbecile, and all three Courts have

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4. *Molton* v. *Camroux* (1848), 2 Exch. 487, 4 Exch. 17; *Imperial Loan Co. v. Stone*, L. R. (1892), 1 Q. B. 599; *York Glass Co. Ltd.* v. *Jubb* (1925), 134 Law Times Reps. 36, 42 T. L. R. 1, C. A.

5. *Wooley* v. *Gaines* (1901), 114 Ga. 122, 39 S. E. 892; *Nutter* v. *Des Moines Life Ins. Co.* (1912), 156 Iowa 539, 136 N. W. 891; *Merry* v. *Berfeld* (1914), 264 Ill. 84, 105 N. E. 758; *McKenzie* v. *Donnell* (1899), 151 Mo. 431, 52 S. W. 214; *Fulwider* v. *Ingels* (1882), 87 Ind. 414; *Hays* v. *Spangenberg* (Texas Civ. App. 1936), 94 S. W. (2d) 899; *Loomis & Hayden* v. *Spencer & Rolph* (1830), 2 Paige (N.Y.) 153; *Edwards* v. *Miller* (1924), 102 Okla. 189, 228 Pac. 1105; *Cash* v. *Bank of Lowes* (1922), 196 Ky. 570, 245 S. W. 137; *Woolbert* v. *Lee Lumber Co.* (1928), 151 Miss. 56, 117 So. 354; *Hancock* v. *Haley* (Texas Civ. App. 1914), 171 S. W. 1053; *Ipock* v. *Atlantic & N. C. R. Co.* (1912), 158 N. C. 445, 74 S. E. 352; *Wireback's Ex'r* v. *Eastern First National Bank* (1891), 97 Pa. St. 543, 39 Amer. Reps. 821; *Crawford* v. *Scovell* (1880), 94 Pa. 48, 39 Am. Rep. 766; *Eaton* v. *Eaton* (1874), 37 N. J. L. 108, 18 Am. Rep. 716; *Sparrowhawk* v. *Ervin* (1926), 30 Ariz. 238, 246 Pac. 541; *Walsh* v. *Feustel* (1919), 93 Conn. 336, 105 Atl. 696; *Brown* v. *Cory* (1900), 9 Kan. App. 702, 59 Pac. 1097; *Flack* v. *Gottschalk Co.* (1898), 88 Md. 368, 41 Atl. 908; *Schaps* v. *Lehner* (1893), 54 Minn. 208, 55 N. W. 911; *Anderson* v. *Nelson* (1929), 248 Mich. 100, 226 N. W. 830; *Bell* v. *Smith* (1929), 155 Miss. 227, 124 So. 331; *Miller* v. *Barber* (1905), 73 N. J. L. 38, 62 Atl. 276; *Hosler* v. *Beard* (1896), 54 Ohio St. 398, 43 N. E. 1040; *Pritchett* v. *Thomas Plater & Co.* (1921), 144 Tenn. 406, 232 S. W. 961; *National Metal Edge Box Co.* v. *Vandervoer* (1912), 85 Vt. 488, 82 Atl. 837; *Morris* v. *Hall* (1921), 89 W. Va. 460, 109 S. E. 493.

6. *Dexter* v. *Hall* (1873), 82 U. S. 9, 21 L. Ed. 73; *Kendall* v. *Ewert* (1922), 259 U. S. 139, 66 L. Ed. 862; *Plaster* v. *Rigney* (C.C.A. 8, 1899), 97 Fed. 12; *Edwards* v. *Davenport* (1883), 20 Fed. 756; *Anglo-Californian Bank* v. *Ames* (1886), 27 Fed. 727; *German Savings & Loan Society* v. *DeLashmutt* (1895), 67 Fed. 399; *Clark Car Co. of New Jersey* v. *Clark et al.* (D.C. Pa. 1925), 11 Fed. (2d) 814; *Sothern* v. *United States* (D.C. Ark., 1926), 12 Fed. (2d) 936; *Farmers Bank & Trust Co.* v. *Public Service Co. of Ind.* (1936), 13 Fed. Supp. 548; *Beale* v. *Gibaud*, 15 Fed. Supp. 1020; *Safe Deposit & Trust Co.* v. *Tait*, 54 Fed. (2d) 383; *Kevan* v. *John Hancock Mutual Life Ins. Co.*, 3 Fed. Supp. 288; *Levine* v. *Whitney*, 9 Fed. Supp. 161.

found that status quo can be restored. (R. trial Court 526, Supreme Court 579, C. C. A. 1605.) If we were to admit that Waialua was a bona fide purchaser for an adequate consideration—which we most emphatically do not—then, under the rule prevailing throughout America, the decision in this suit treats Waialua with every consideration to which it is entitled. In fact, as outlined in our cross-petition, it gives Waialua more than it would be entitled to receive under the application of well settled principles to facts found in this case. However, we are willing to abide by the decision and offer our arguments merely in defense thereof.

Replying to Waialua's specific contentions under this Point 1, the first of which is (Pet. p. 24) that the proper rule is that contracts of incompetents are valid and will not be set aside if made in good faith and for an adequate consideration, we concede that such is the rule in England. In addition to the cases cited by Waialua, we have added (supra, fn. 4, p. 14) *York Glass Co. Ltd. v. Jubb*, which is a better example that the ability of the incompetent to restore the status quo is not involved under the English rule. That, however, is not the rule either in the state Courts or the Federal Courts in the United States.[7] Such a rule does not prevail in any state or in any Federal Court in America, either District, Circuit, or the Supreme Court.

Waialua claims that the rule for which it contends prevails in New York, Iowa, North Carolina, Missouri, Pennsylvania, New Hampshire and New Jersey. (Pet.

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7. The difference between the English and American rule is recognized in an elaborate footnote in the earlier edition of Pollock on Contracts cited by Waialua. See Wald's Pollock on Contracts, 3rd Ed. page 100, footnote 52.

pp. 25-26.) It cites no Federal case to support such a proposition. We know of none. We challenge its statement with respect to each state it claims, and review them:

1. *New York*—Waialua cites *Goldberg v. McCord* (1925), 251 N. Y. 28, 166 N. E. 793. In that case the Court found that there was no evidence of incompetency when the deed was made. The statement quoted from the case is mere dictum and certainly does not overrule the flat holding of *Loomis & Hayden v. Spencer & Rolph* (1830), 2 Paige N. Y. 153, and *Riggs v. American Tract Society* (1881), 84 N. Y. 330, each of which decisions permitted cancellation upon restoration to *status quo*. A further and conclusive answer to the authority of the Goldberg case is that given by Mr. Justice Cardozo in the opinion written by him in *Hoadley v. Hoadley* (1927), 244 N. Y. 424, 155 N. E. 728, wherein he pointed out (at p. 431) that it is the general rule that "the right to avoid is for the personal protection of the one who is disabled".

2. *North Carolina*—Waialua cites *West v. Seaboard Airline Railroad* (1909), 151 N. C. 231, 65 S. E. 979. This case would appear to turn upon the failure of the incompetent to offer restoration.

The law of North Carolina is that the incompetent may set aside the transaction if status quo is restored. (*Ipock v. Atlantic & N. C. R. Co.*, supra. (fn. 4, p. 14).) Moreover, as pointed out in the *Ipock* case, the burden of showing good faith and lack of knowledge of incompetency, and that status quo cannot be restored, is, if cancellation is to be avoided, upon the party dealing with the incompetent.

3. *Iowa*—Waialua cites *Ashcraft v. DeArmand* (1876), 44 Iowa 229. This case turns on the inability of the incompetent to restore *status quo* or to offer so to do.

The law of Iowa is that when *status quo* can be restored cancellation will be decreed.

Nutter v. Des Moines Life Ins. Co. (1912), 156 Ia. 539, 139 N. W. 891.

4. *Missouri*—Waialua cites *Rhoades v. Fuller* (1897), 139 Mo. 179, 40 S. W. 760. This case turns on the lack of evidence of incompetency.

The rule in Missouri is clearly set out in *McKenzie v. Donnell* (1899), 151 Mo. 431, 52 S. W. 214; where the contract of the incompetent was set aside and in which the *Rhoades* case is considered.

5. *Pennsylvania*—Waialua cites *Beals v. See* (1848), 10 Pa. 56, 49 Amer. Dec. 573, and *Rubins v. Hamnett* (1929), 294 Pa. 295, 144 Atl. 72. The *Beals* case may be said to support Waialua's contention, but the real ground of the *Rubins* case is that the party in whose behalf relief was sought was in fact competent. We submit that in view of the decisions in *Wirebach's Ex'r v. Eastern First Nat'l Bank* (1891), 97 Pa. 543, 39 Am. Rep. 821, and *Crawford v. Scovell* (1880), 94 Pa. 48, it is the rule in Pennsylvania that, in any event, if restoration can be restored the incompetent is entitled to have his contract set aside.

6. *New Jersey*—Waialua cites *Eaton v. Eaton* (1874), 37 N. J. L. 108, 18 Am. Rep. 716, and *Mattheissen v. McMann*, 38 N. J. L. 536. The incompetent prevailed in both of these cases, and in the *Matthcissen* case the Appellate Court affirmed the trial Court's refusal to give an

instruction offered by the defendant that "nothing but imposition on an insane person will avoid his contract". These two cases declare the law of New Jersey; that the incompetent may set aside his bargain upon restoring *status quo*.

7. *New Hampshire*—Waialua cites *Young v. Stevens* (1868), 48 N. H. 143, 2 Am. Rep. 202, 97 Am. Dec. 592. This case does not support Waialua's contention, but holds rather that in that instance restoration could not be made.

Even though controlling decisions in the instant suit were those of the several state Courts, we submit that the finding of incompetency and that status quo can be restored entitles the incompetent to set aside the questioned instruments, as has been directed by the Circuit Court of Appeals. When, however, we recognize, as we must,[8] that the rule of decision in this suit arising in the Territory of Hawaii is the rule prevailing in the Federal Courts, then it is beyond question that such a showing is sufficient; in fact, in many of the Federal cases restoration is not a condition to cancellation, it being enough merely to prove incompetency.[9]

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8. *Kapiolani Estate v. Atherley* (1913), 21 Haw. 441; *Territory v. Ho Me* (1922), 26 Haw. 331; *Colburn v. U. S. F. & G. Co.* (1929), 25 Haw. 536; *Hill v. Carter* (C.C.A. 9, 1931), 47 Fed. (2d) 869 (cert. den. 248 U. S. 625); *Pyeatt v. Powell* (C.C.A. 8, 1892), 51 Fed. 551; *Successors of Fantanzzie v. Municipal Assembly* (C.C.A. 1, 1924), 295 Fed. 803.

9. See supra, page 14, footnote 6.

REPLY TO POINTS II TO V, INCLUSIVE, WHICH, IN SUBSTANCE, ARE THAT THE RESTORATION DECREED WAS NOT SUFFICIENT.

The portion of the brief commencing at page 29 and extending through page 44 argues that, in directing the incompetent to restore Waialua to status quo as a condition to cancellation, Waialua has not been given a sufficient allowance—that status quo within the meaning of the rule has not been restored. This argument in no way supports the petition, (and therefore might well be dismissed, *Gunning v. Cooley*, supra) but, on the contrary, must necessarily concede that the Circuit Court of Appeals did not decide that the instruments were void in the sense of being nullities, for if that were so no restoration of any description would have been compelled. Once it is determined that the Circuit Court of Appeals did not apply the rule that contracts of incompetents are a nullity, the *only reason* assigned in the petition for the allowance of the writ fails in its entirety.[10]

(a) The meaning of the term "status quo".

We will not analyze each case cited in support of Waialua's conception of the meaning of the term "status quo" as used in defining the condition upon which one having a ground for rescission may obtain relief in a court of equity. We do, however, invite their close inspection. Of those cited in support of Point II[11] (Petition pp. 29-37), only one, *Riggan v. Green*, can be said to

10. The contention that the Circuit Court of Appeals held that it is error for the trial Court to balance the equities of the parties has been dealt with in footnote 3, page 7, herein.

11. *Yauger v. Skinner* (1862), 14 N. J. Eq. 389; *Veblett v. McFarland* (1876), 92 U. S. 101, 23 L. Ed. 471; *Holly v. Missionary Society* (1901), 180 U. S. 284, 45 L. Ed. 531; *Grimes v. Sanders* (1876), 93 U. S. 55, 23 L. Ed. 798; *Riggan v. Green* (1879), 80 N. C. 236, 30 Am. Rep. 77; *Rickman v. Houck* (1921), 192 Ia. 340, 184 N. W. 657.

touch the question of the meaning of the term. The rest are decided on other grounds entirely, and the quotations made therefrom are purest dicta. We maintain that the instant decision makes ample provision for Waialua, in complete conformity with the requirements of the rule making restoration to status quo a condition precedent to cancellation, and we refer the Court to the authorities cited by us to the Circuit Court of Appeals, which are directly in point.[12] The rule only requires substantial restoration consistent with the practical considerations of the case. Mathematical exactness is not necessary.

Mather v. Barnes, (1906) 146 F. 1000;

McKenzie v. Donnell, (1899) 151 Mo. 461; 52 S. W. 222.

12. *Black on Rescission and Cancellation*, 2d Ed., Vol. III, Sec. 616, at pp. 1484-5; *Thompson on Real Property*, Vol. III, Sec. 2846; *Tiffany on Real Property*, 2d Ed., Vol. III, Sec. 595, at p. 2345; *Burnham, Administrator, v. Mitchell* (1874), 34 Wis. 117; *Dermott Land & Lbr. Co. v. Zelnicker* (C.C.A. 8, 1921), 271 F. 918 (cert. den. 257 U. S. 648, 66 L. Ed. 415); *Hale v. Kobbert* (1899), 109 Iowa 128, 80 N. W. 308; *Kruger v. Block* (1926), 114 Neb. 839, 211 N. W. 173; *Wright v. Dickinson* (1887), 67 Mich. 580, 35 N. W. 164; *Bank Savings Life Ins. Co. v. Steiner* (Tex. Civ. Apps. 1935), 81 S. W. (2d) 225; *Duson v. Pacific Improvement Co.* (C.C.A. 5, 1927), 18 F. (2d) 5; *Neblett v. Macfarland* (1876), 92 U. S. 101, 23 L. Ed. 471; *American Wine Co. v. Brasher Bros.* (Cir. Crt. Colo. 1882), 13 F. 595; *Hammond v. Pennock* (1874), 61 N. Y. 145; *Cohen v. Ellis* (1885 N. Y.), 16 Abbott's N. C. 320; *Maupin v. Missouri State Life Ins. Co.* (Kansas City Crt. Apps., Mo., 1919), 214 S. W. 398; *Green v. Security Mutual Life Ins. Co.* (1911), 159 Mo. App. 277, 140 S. W. 325; *Felt v. Bell* (1903), 102 Ill. App. 218, 68 N. E. 794; *Green v. Hopper* (Tex. Civ. Apps. 1925), 278 S. W. 286 (rehearing denied 1925); *McDonald v. Simons* (1926), 280 S. W. 573; *Burgess v. Burgess* (1925), 130 S. C. 265, 126 S. E. 34; *Wilks v. McGovern-Place Oil Co.* (1926), 189 Wis. 420, 207 N. W. 692; *Ring v. Ring* (1908), 111 N. Y. S. 713, 127 App. Div. 411; *Mather v. Barnes* (C.C. W.D. Penn. 1906), 146 F. 1000; *Jones v. Galbraith* (1900), 59 S. W. 350; *Cheves-Green & Co. v. Horton* (1933), 177 Ga. 525, 170 S. E. 491, 492; *Fields v. Union Central Life Ins. Co.* (1930), 170 Ga. 239, 152 S. E. 237; *Hamilton Ridge L. Corp. v. Boston Ins. Co.* (1925), 133 S. C. 472, 131 S. E. 22, 26; *Whiteley v. Downs* (1932), 174 Ga. 839, 164 S. E. 318, 320; *Williams v. Sapieha* (1901), 94 Tex. 430, 61 S. W. 115, 118; *Rea v. Bishop* (1894), 41 Neb. 202, 59 N. W. 555, 556; *Brown v. Brenner* (Tex. Civ. Apps. 1913), 161 S. W. 14, 16-17.

(b) The improvements and the incorporation of the land as an integral part of the plantation.

Waialua did not, as it implies (Pet. p. 36), incorporate the ward's land as an integral part of its plantation in reliance upon the deed or title cancelled in this suit. (Supra page 5c.) Beyond that it is clear that a large part of its expenditures for improvements were made before it took the deed from the ward, and consequently Waialua could not have been relying on this purchase in so doing. The Brief states (p. 36) that $630,722 was spent on the Holt tract. Waialua's own testimony shows that before it took the deed it spent $182,525 of this sum. (R. 1507, Exh. S-5.) The land—Waialua's 2/3rd as well as the ward's one-third—had to be cleared and made ready for cultivation by Waialua to permit of its use contemplated under the lease. (R. 498.) This use proved very profitable to Waialua. (R. 1278.) The lease term has expired, and accordingly Waialua has had the complete benefit of these improvements. Waialua states (Pet. p. 36) that it spent $504,652 off the Holt land. This item relates to the Wahiawa Reservoir, and its own testimony (R. 1242) was that this reservoir was originally built in 1906. The deed was taken in 1910. It is true that after the date of the deed repairs were made on this reservoir. The decree, however, in no way disturbs Waialua's title or use of this reservoir. It serves the whole plantation.

It is clear that of the $1,000,000 Waialua speaks of as having spent on its whole plantation of 49,000 acres, $451,206 was spent before the ward's interest was purchased (R. 1507, Exh. S-5 and R. 1515, Exh. S-7), and of the balance $454,223 was spent before the lease of

1905 expired, and while independent of the ward's interest Waialua owned an undivided 16/27ths of the Holt area and leased the whole thereof. The Holt area was 14,000 acres out of the whole plantation of 49,000 acres. The ward's undivided one-third interest in 14,000 acres represents about 9½% of Waialua's total holding. It borders on ridiculousness to claim that these improvements were made on the strength of the interest acquired from the ward.

Beyond this, the decision sought to be reviewed provides that Waialua should be repaid for the value of the improvements on the land. (R. 1616-18.) It will, moreover, still retain their use, together with the land, as a part of its plantation (supra, p. 6), for even after the ward's interest is reconveyed to her Waialua will own outright, or control by lease, an undivided two-thirds of the property and be a co-tenant in possession.

The effect of the decree on the lease of 1905 is only to require Waialua to pay the reasonable rental value of the ward's interest as opposed to the amount called for therein, against which the ward is required to reimburse Waialua for the value of the improvements it has placed on the land during the term of the lease and since it took the deed, which improvements, by the provisions of the lease (R. 486), were to become the ward's property without cost at its expiration in 1930.

(c) The vesting of the contingent interest—the assumption of risk.

Waialua continues to argue (Pet. pp. 38-40) that because the incompetent's father died after Waialua took

the deed, and accordingly the incompetent's interest ripened from a contingent remainder into a fee, a court of equity is powerless to grant relief against the deed. In substance, it says that since the death of a third party has increased the value of the incompetent's interest that it (Waialua) should have this unearned increment rather than the incompetent. It should be remembered that if Waialua had never made the purchase the incompetent's father would nevertheless have died, and her interest would have been increased to the same extent. Waialua's purchase in no way contributed to this improvement in the incompetent's title.

The fact that after the degree the incompetent has more than she had before the bargain was made, that improvement in condition not, however, being due to anything taken away from Waialua, but an additional value created without any participation by Waialua, does not prevent restoration to status quo within the meaning of the rule. This is the principle controlling the decision by the Circuit Court of Appeals of the Eighth Circuit in *Dermott Land & Lbr. Co. v. Zelnicker* (supra, fn. 12, p. 20), in which certiorari was denied.

The argument that since in purchasing a contingent remainder from the incompetent ward Waialua ran the risk that the contingency might never occur and the title vest is no obstacle to setting aside the bargain. The interposition of a risk upon the one against whom grounds for cancellation exist does not prevent relief being granted. This is true in the sale of any expectancy as illustrated by cases holding that the death of the party upon whose life the expectancy is dependent does

not foreclose the seller of such expectancy from setting aside the sale if grounds exist therefor:

McKinney v. Pinckard (1830), 2 Leigh. (Va.) 150; 21 Am. Dec. 601;

Boynton v. Hubbard (1810), 7 Mass. 112;

and by the cases in which, although the defendant insurance companies have taken a risk which has turned out to their advantage, rescission is allowed to the insured.

Maupin et al. v. Missouri State Life Ins. Co. (Kansas City Ct. Apps., Mo., 1919), 214 S. W. 398;

Green v. Security Mut. Life Ins. Co. (1911), 158 Mo. App. 277, 140 S. W. 325;

Bank Savings Life Ins. Co. v. Steiner (Texas Civ. Apps. 1935), 81 S. W. (2d) 225;

McCarty v. N. Y. Life Ins. Co. (1898), 74 Minn. 530, 77 N. W. 426.

It is also demonstrated by the cases in which the insurance companies are permitted, on the ground of misrepresentation, to cancel the policies or defend against an action to recover thereon after the risk has turned out to the advantage of the insured or his beneficiaries. *Enelow v. N. Y. Life Ins. Co.* (1935), 293 U. S. 379, 79 L. Ed. 440, wherein the Court declared that the affirmative equitable defense that the policy had been obtained by the misrepresentations of the insured was open to the insurer after the death of the insured in an action at law brought upon the policy.

American Life Ins. Co. v. Stewart, (1937) 300 U. S. 203; 81 L. Ed. 605, in which the Court declared that the insurer might, after the death of the insured, maintain a bill in equity to cancel the policy upon the ground that

it had been obtained through the misrepresentations of the insured.

Waialua cites (Pet. p. 39) *Molton v. Camroux* (1848), 2 Exch. 487; 4 Exch. 17; *Mutual Life Insurance Co. v. Smith* (1911), 184 Fed. 1, and *Williams v. Penn Mutual Insurance Co.* (1925), 6 Fed. (2d) 332, 27 Fed. (2d) 1, in support of its proposition that restoration is impossible in this case. The *Molton* case was previously cited in support of the contention that under the English rule a fair contract will not be set aside regardless of the ability to restore the status quo. That is the English rule and it is recognized as being such by the Circuit Court of Appeals in the instant opinion. (R. 1602.) The *Molton* case, along with *Imperial Loan v. Stone*, L. R. 1892, 1 Q. B. 599, and *York Glass Co. Ltd. v. Jubb* (1925), 134 Law Times Rep. 36, 42 T. L. R. 1, C. A., turned upon that proposition. The *Molton* case has nothing to do with what or what is not restoration to status quo within the meaning of the rule obtaining in the State and Federal Courts in America. *Mutual Life Insurance Co. v. Smith* and *Williams v. Penn Mutual* rest upon the determination that no ground of cancellation existed—not upon the proposition that restoration could not be effected.

The death of the ward's father does not add any equity to Waialua's position. It in no way prevents putting Waialua back where it was when the bargain was made.

Waialua argues, under its Point V (Petition pp. 42 to 44), that innocent purchasers should not be injured by permitting incompetents to set aside their transactions, and cites *Coburn v. Raymond* (1904), 76 Conn. 484, 57 Atl. 116, and *Edwards v. Miller* (1924), 102 Okla. 189,

228 Fac. 1105. The decision of the Circuit Court of Appeals in this suit has, as a condition to cancellation, required the incompetent to restore the status quo. That fact eliminates any injury to Waialua, for, as the opinion points out (R. 1603), "It is no legal hardship on the party dealing with the incompetent if it receives back what it gave in the bargain". What Waialua is really attempting to say, is that it should be entitled to the benefit of its bargain. But one who enters into a transaction voidable at the instance of the other party never retains the benefit of the bargain. The Court here has balanced the equities. Waialua has no equity calling for its retention of all the benefit of the bargain. That it must lose, in part, so that the incompetent may get back her property. It still will have the profits of its operation of the ward's land. (R. 518-19; 1278.) There is nothing in either the *Coburn* or the *Edwards* case even suggesting that Waialua has not been adequately treated in this case. In fact, in the *Edwards* case cancellation was ordered without requiring restoration.

REPLY TO POINT VI, WHICH IS "THAT THE DOCTRINES ANNOUNCED BY THE COURTS BELOW HAVE INNUMERABLE UNDESIRABLE CONSEQUENCES".

We have already pointed out that Waialua's fears that the decision will disrupt land titles is unfounded, because the Circuit Court of Appeals has not decided that the deed of an incompetent is a nullity, but, on the contrary, has obviated every consequence imagined by Waialua through holding that incompetency alone is not enough but must be coupled with an ability to restore the status quo. We may add that if the decision had been that the

deed was a nullity it would have abundant support in the decisions. One of them[13] has stood since 1873, and, so far as we know, there has been no unwarranted assault upon the titles of innocent persons.

We submit that the decision of the Circuit Court of Appeals in this case is amply supported by the authorities and is sound upon the grounds therein set forth. The petitioner has wholly failed to establish any of the reasons outlined in Rule 38, subdivision 5, which would support a writ of certiorari. Beyond the grounds, however, upon which the decision rests, there are other and additional grounds upon which the decision might have been placed and which were urged by the incompetent before the Circuit Court of Appeals. We will now outline them.

GROUNDS IN SUPPORT OF THE DECISION IN ADDITION TO THOSE UPON WHICH IT IS PLACED.

The decision herein assumes that Waialua is a bona fide purchaser for an adequate consideration and rests upon the ground that a contract of an incompetent will be set aside at the instance of the incompetent, even though the bargain is fair, where as here status quo can be restored. Thus far, in meeting the petition for certiorari, we have assumed these facts to be true. In fact, however, the record compels the conclusion that (a) Waialua had knowledge of the incompetency, and the transaction was not fair and open; (b) the price paid for the land was not adequate, and (c) the incompetent never received the consideration. Beyond that the rule of decision in this case arising in the Territory of Hawaii

13. *Dexter v. Hall*, supra, fn. 6, page 14.

is that the questioned instruments are void and a nullity regardless of the assumed good faith of Waialua. We shall discuss these propositions in the order named.

If any of the points is well taken, the decision reaches a correct result and accordingly the writ should not issue.

Alpha S. S. Corp v. Cain (1930), 281 U. S. 642, 74 L. Ed. 1086;

Stelos Co. v. Hosiery Motor-Mend Corp. (1935), 295 U. S. 237, 79 L. Ed. 1414;

Indiana Farmers Guide Publishing Co. v. Prairie F. P. Co. (1934), 293 U. S. 268, 79 L. Ed. 356;

Erwin v. Lowry (1849), 7 How. 172, 12 L. Ed. 655.

(a) Waialua had knowledge of the incompetency.

(1) The burden was upon Waialua to prove that it was an innocent purchaser and it failed so to do.

Curtis v. U. S. (1923), 262 U. S. 215, 67 L. Ed. 956;

Wright-Blodgett Co. v. U. S. (1915), 236 U. S. 397, 59 L. Ed. 637;

Treat v. Rogers (C. C. A. 8, 1929), 35 Fed. (2d) 77.

In its first and second answers filed in 1928 and 1929, respectively (R. 64, 101), Waialua did not plead that it was an innocent purchaser. In its third answer (R. 409) filed in 1931, after the trial in which the invalidity of the deed was decided and before the trial on the remand from the Supreme Court of Hawaii with respect to the lease and assignment, it did so plead, but it did not offer any proof thereof. The finding of the trial Court was "that it is not clearly shown that Waialua Company had actual notice of the incompetency" (R. 154); the Court

stated that it "proceeded on the assumption that Waialua was ignorant of her real mental status. But this fact does not justify the conclusion that the Company was a 'subsequent grantee' or an 'innocent purchaser'. (R. 154.) The Supreme Court of Hawaii, in its second opinion, stated that Waialua did not have knowledge of the incompetency. (R. 555.) The United States Circuit Court of Appeals assumed for the purpose of its decision that Waialua did not have knowledge of the incompetency. (R. 1637.) There is no evidence in the record from which a finding that Waialua did not have knowledge of the incompetency throughout its dealings with the incompetent can be made. Waialua failed to sustain its burden of proof and the finding on the issue should have been against it.

Golson v. Dunlap (1887), 73 Cal. 157, 14 Pac. 576;
Campbell v. Buchman (1874), 49 Cal. 362;
64 *C. J.* 1258.

Because of Waialua's failure to sustain its burden of proof it is deprived of any benefit which under the rules may be claimed by a bona fide purchaser.

(2) Aside, however, from Waialua's failure to sustain its burden of proof, the record shows affirmatively that it had knowledge of the incompetency. Waialua would have this Court believe that it made a direct purchase from an apparently competent person to whom it paid an adequate consideration, having no idea that the seller was anything but a normal individual. Nothing could be further from the fact. In truth, Waialua had for years been striving to acquire the Holt property (R. 1259-1260), in which the incompetent had an undivided one-third contingent remainder interest. In eight separate transactions

over a period of eleven years it acquired from the various Holt heirs, other than the incompetent, a total of 16/27ths undivided interest in the Holt property (R. 1259-1260; 849-50, subdivisions 3, 4; 894, subdivision 12; 894, subdivision 13; 894, subdivision 14; 899, subdivision 16; 960), each time taking title in the name of a dummy. The Holt property had been acquired originally by the incompetent's grandfather, who died in 1862. (R. 843.) The incompetent is a native of Hawaii. (R. 210, 1587.) Her father was profligate. (R. 121.) As the trial Court stated, there was no one to whom the incompetent could look for disinterested information or advice. (R. 155-6.) Over 100 witnesses, drawn from the comparatively small community of Honolulu, in which the Holt family had lived for three generations (and in which the incompetent lived until 1906 when she was taken by her cousins, the Kentwells, to live with them in Oxford, England), testified on the issue of her competency. From this testimony the trial Court concluded, and the Supreme Court of Hawaii and the United States Circuit Court of Appeals have agreed in the conclusion, that she was a congenital imbecile possessing a most limited mental development.[14]

These facts cast light on the probability of Waialua's ignorance of the capacity of the incompetent, particularly when it is realized that its counsel, D. L. Withington, went to Oxford, England, and obtained her signature. However, we need not predicate our statement that Waialua had knowledge of the incompetency on surmises. It follows as a matter of law from the facts found.

In order to acquire the incompetent's interest in the property, Waialua engaged the services of her cousin.

14. Supra, pages 2-4.

James L. Holt. This Waialua admits in its answer. (R. 65-66.) He proceeded, upon the direction of Mr. Castle, Waialua's attorney, "to go ahead and negotiate with the parties in England" (R. 1010), to correspond with Lawrence Kentwell, with whom the incompetent was living. The communications between Waialua, acting through Holt, and Kentwell (*not, we point out, with the incompetent ward*) consist of a series of writings which are most illuminating. Whatever was done by Holt was done with the knowledge and supervision of Waialua. (R. 147.) In substance, these communications shows that Holt (who incidentally is in no way related to the guardian Herman V. Von Holt) wrote to Kentwell suggesting the sale of the incompetent's interest, as well as his (Holt's) own, to Waialua. (R. 906, Exh. D-1.) Upon obtaining a reply, Holt immediately transmitted it to Castle, Waialua's attorney. (R. 908-9, Exh. D-2.) Holt then wrote to Kentwell (R. 913-15, Exh. D-5), telling him, no doubt at the direction of Castle, that "the Waialua people have intimated strongly that should this attempt upon their part to buy fail they will resort to a suit in partition for a sale of the land at public auction * * * they will acquire the same at any old price they feel like paying; who can oppose them successfully, we all have not got the money". (R. 915.) Kentwell replied that the incompetent would sell at the suggested price if Mrs. Kentwell were given $5000. (R. 915-16, Exh. D-6,) Mrs. Kentwell claimed an interest. Kentwell wrote again, twenty-two days later (R. 919-20, Exh. D-8), urging Waialua to hurry because he states another prospective purchaser, Mr. L. McCandless, had made a better offer.

Waialua's delay was apparently due to the necessity of obtaining the signature of the ward's husband. He, from whom she had been separated for many years, was eliminated when Castle obtained an agreement from him to sign a consent to any transfer Castle should approve. (R. 902, subd. 19.) Thereupon Castle cabled his partner, Withington, who was in Boston that he should go to Oxford, England, where the incompetent was living, and close the deal. (R. 922, Exh. D-10.) Three days later Castle again cabled Withington to hurry because another prospective purchaser was sending an agent to London. (R. 922, Exh. D-11.) The following day Castle again urged Withington to hurry, and his communication clearly exhibits Waialua's knowledge of the straitened condition of the incompetent. The cable in part states (R. 925, Exh. D-13): "HAVE EVERY REASON TO BELIEVE LINK (McCandless) WILL KEEP THEM SUPPLIED WITH MONEY PROVIDED THEY CAN COME AMERICA WHERE EXPECT TO MEET TRENT WHY DO YOU NOT COMMUNICATE WITH KENTWELL BY CABLE TRY TO ASCERTAIN MOVEMENTS". On April 16th Castle cabled Withington (R. 934, Exh. D-21): "ELIZA AND JOHN D ACCEPT THIRTY THOUSAND MUST BE INCLUSIVE OF PROSPECTIVE INTEREST ANNIE KENTWELL WANTS FIVE THOUSAND HER INTEREST MAKE LESS IF POSSIBLE MUST NOT EXCEED THIRTY FIVE THOUSAND PRICE TO WAIALUA MUST BE KEPT SECRET". Of course, Waialua wanted to hide the real bargain because their agent, Holt, was getting a substantial sum for his services, while the impression was being created that he and the incompetent were being treated in the same way. As the trial Court found, James L. Holt imposed "upon his position" to obtain a secret profit and the

facts were known to Waialua. (R. 158.) This in itself constituted overreaching.

Felt v. Bell (1903), 102 Ill. App. 218, 68 N. E. 794;

Halsbury's Laws of England, 2d Ed., p. 283, Sec. 505;

Pomeroy's Equity Jurisprudence (Fourth Edition), Vol. 2, Sec. 953, p. 2031.

On April 19th, three days later, Castle cabled Withington (R. 935, Exh. D-22): "KENTWELL SENDS FOLLOWING MESSAGE TO HOLT WILL AGREE TO ABIDE BY YOU THOUGH LINK OFFERS A BETTER PROPOSITION". Withington sailed for London, arriving about April 26th. (R. 934, Exh. D-25.) On April 28th, in Honolulu, a letter was sent over Holt's signature, after conferring with Castle (R. 1011), warning McCandless not to interfere with the pending transaction (R. 939, Exh. D-26), and the same day, Castle, in Honolulu, cabled Withington in London (R. 940, Exh. D-27): "A DELAY IS DANGEROUS WE CONSIDER IT ADVISABLE CLOSE IMMEDIATELY BEFORE ARRIVAL TRENT EXCLUDING INSURANCE CLAUSE HAVE DEED EXECUTED AT ONCE AND FORWARD IT AUTHORIZE YOU TO PAY ELIZA THIRTY THOUSAND DOLLARS ANNIE FIVE THOUSAND DOLLARS ON TERMS SPECIFIED THEIR LETTER OF MARCH EIGHTH MUST HAVE A DEFINITE REPLY MCCANDLESS HAVE BEEN NOTIFIED OUR RIGHTS MUST BE UPHELD". Castle, it will be noticed, referred to Holt's letter to McCandless as a warning that "our", meaning Waialua's, rights must be upheld. Waialua, of course, was the real party in interest. Two days later, on April 30th, Withington, in London, cabled to Castle in Honolulu to inquire to whom the deed should run (R. 943, Exh. D-33), and Castle re-

plied "JAMES LAWRENCE HOLT". (R. 943, Exh. D-34.) Two days later, on May 2, 1910, the deed was signed. This is the deed which the trial Court, the Supreme Court of Hawaii and the Circuit Court of Appeals have each directed should be cancelled.

The findings are clear that Holt was the agent, and Waialua the real party in interest, in the 1910 transaction with the incompetent (R. 112, 148, 155, 473, 482; in fact, Waialua so stipulated (1061):

> "(Counsel for Waialua then admitted that the purchase of May 2, 1910, was made originally for the benefit of Waialua Company and that the series of transactions subsequent thereto gave the respondent no different status than it had by virtue of the deed of May 2, 1910 (Ex. A-21), * * *."

The finding is that Holt knew of the incompetency. (R. 133, 481, 482, 492.) Holt's knowledge of the incompetency when he acted as agent for Waialua in acquiring the incompetent's property is imputed to Waialua.

Curtis v. U. S. (1923), 262 U. S. 215, 67 L. Ed. 956;

Harrington v. U. S. (1871), 78 U. S. 356, 20 L. Ed. 167;

McCaskill Co. v. U. S. (1910), 216 U. S. 504, 54 L. Ed. 590;

U. S. v. Cooksey (C. C. A. 9, 1921), 275 Fed. 670;

Veazie v. Williams (1849), 8 How. 134, 12 L. Ed. 1018.

No other construction can be placed upon this transaction than that Waialua overreached the incompetent. Through an agent who knew of the incompetency, it drove a hard and shrewd bargain with her. The trial

Court's view of the transaction is set out in its opinion (R. 139-157), and we refer to it to support our contention. It is unquestionably the rule that one who deals with an incompetent with knowledge of the incompetency is guilty of fraud, and the contract will be set aside at the instance of the incompetent.[15] Indeed, it has been held by this Court to be an absolute nullity. (*Kendall v. Ewert* (1922), 259 U. S. 139, 66 L. Ed. 862.)

(b) The price was not adequate—the incompetent never received it.

The trial Court was of the view that the price, namely, $30,000, paid by Waialua was not adequate. (R. 159.) This, we submit, was a correct finding. It is true that the Supreme Court said that it could not agree that $30,000 was an inadequate price (R. 304), but that Court also found that the incompetent never received the consideration (R. 294, 301), and set the deed aside because it was not beneficial to her—accordingly its view of the value of the interest is of no importance. One further circumstance should be pointed out, and that is that the Supreme Court held that, when sold, the incompetent's interest was burdened by the instrument of 1906, which it construed to be a transfer by the incompetent of the

15. *Story Equity Jurisprudence* (14th Ed.) Vol. I, Sec. 317; *Williston on Contracts* (Rev. Ed. 1936), Vol. I, Sec. 250; *Kaliikea v. Hapa* (1901), 13 Haw. 459; *Brewster v. Weston* (1920), 235 Mass. 14, 126 N.E. 271; *Atkinson v. McCulloh* (1926), 149 Md. 662, 132 Atl. 148; *Barkley v. Barkley* (1914), 182 Ind. 322, 106 N.E. 609; *Cochran v. Norris* (1935), 175 Okla. 26, 51 Pac. (2d) 736; *Wells v. Wells* (1926), 197 Ind. 286, 150 N.E. 361; *Stewart v. Stewart* (1915), 85 Wash. 202, 147 Pac. 1157; *Curtis v. Brownell* (1879), 42 Mich. 165, 3 N.W. 936; *Kent v. Larue* (1907), 136 Iowa 113, 113 N.W. 547; *Jefferson v. Rust* (1910), 149 Iowa 594, 128 N.W. 954; *Elder v. Schumacher* (1893), 18 Colo. 33, 33 Pac. 175; *Studebaker v. Taylor* (1917), 68 Ind. 747, 80 N.E. 861, 170 Ind. 498, 83 N.E. 747; *Ames v. American Trust & S. Bank* (1906), 224 Ill. 100, 77 N.E. 462; *Fecht v. Freeman* (1911), 251 Ill. 84, 95 N.E. 1043; *Beckwith v. Cowles* (1912), 85 Conn. 567, 83 Atl. 1113; *Shindler v. Parzoo* (1908), 52 Ore. 452, 97 Pac. 755; *Bethany Hospital Ass'n v. Philippi* (1910), 82 Kan. 64, 107 Pac. 530; *Thrash v. Starbuck* (1896), 145 Ind. 673, 44 N.E. 543; 9 C. J. 1216, Sec. 108, footnote 94.

rents, issues and profits of the land for the term of her natural life. (R. 655, para. VIII.) Such a burden, of course, would greatly reduce the value of the incompetent's interest. It has now been determined by the Circuit Court of Appeals that the correct interpretation of the instrument of 1906 is that it is only an assignment of rent to accrue under the 1905 lease (R. 1614), which lease expired in 1930. Waialua does not question this construction before this Court. It is apparent that the interest which the Supreme Court considered not to be unfairly valued at $30,000 is not the interest which the incompetent sold. What she did sell was a much more valuable interest, one in fact which has now been held to have a reasonable rental value for each of the years from 1922, when the ward's title vested, to 1932, when the trial Court entered its decree, in excess of $40,000 per year. (R. 505-523.) Waialua did not pay an adequate consideration: the incompetent did not receive the money: the bargain was not fair: Waialua had knowledge of the incompetency. If any of these propositions is correct, the incompetent is clearly entitled to cancellation of the deed (in addition to the grounds therefor stated in the opinion now attacked), and the decision of the Circuit Court of Appeals is abundantly supported.

(c) The questioned instruments are nullities.

Even though we assume that the bargain was fair, the consideration adequate, that Waialua did not have knowledge of the incompetency, and that *status quo* cannot be restored, nevertheless, all of the questioned instruments must be cancelled because the rule of decision in the

Federal Courts is that a contract of an incompetent is void in the sense of being a nullity.

Derter v. Hall (1873), 82 U. S. 9, 21 L. Ed. 73;

Kendall v. Ewert (1922), 259 U. S. 139, 66 L. Ed. 862;

Plaster v. Rigney (C. C. A. 8, 1899), 97 Fed. 12.

The rule prevailing in the Federal Court is the rule of decision in this case arising in the Territory of Hawaii. (Supra, fn. 8, p. 18.)

CONCLUSION.

None of the grounds of the decision is open to attack by Waialua. Beyond that it is supported by the additional grounds which we have outlined. This is not a case falling within those enumerated in Rule 38 as being one in which certiorari will lie.

Dated, San Francisco, California,
April 15, 1938.

Respectfully submitted,

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